In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-61

NILES SAND & GRAVEL CO., INC., and
INLAND AGGREGATES COMPANY,
Petitioners,

vs.

ALAMEDA COUNTY WATER DISTRICT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California
in and for the First Appellate District

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Petitioners pray that a Writ of Certiorari be issued to review the judgment of the Court of Appeal of the First Appellate District of the State of California entered in this action on March 14, 1974, for which petitioners' petition for hearing in the California Supreme Court was denied on May 8, 1974.

OPINIONS BELOW

The order of the California Supreme Court denying the Petition for Hearing is attached hereto as

Appendix A. The opinion of the Court of Appeal, First Appellate District of the State of California, reported at 37 Cal. App. 3d 924, 112 Cal. Rptr. 846, is attached hereto as Appendix B. The Memorandum Decision of the trial court judge (Judge Lyle E. Cook of the Alameda County Superior Court) is attached hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeal for the First Appellate District of the State of California was filed and entered on March 14, 1974 (Appendix B, page iii). That judgment became final following the denial of the Petition for Hearing in the California Supreme Court on May 8, 1974. This Court has jurisdiction to issue the requested writ pursuant to Section 1257(3) of Title 28, United States Code.

QUESTIONS PRESENTED

Under the Due Process Clause of the Fourteenth Amendment, may a state refuse to pay just compensation when its water conservation and storage activities flood private property and substantially destroy the value of that property?

May a sudden and adverse change in state property law constitute a taking compensable under the Due Process Clause?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this action are the Fifth and Fourteenth Amendments of the United States Constitution, which provide in pertinent part:

> "*nor shall private property be taken for public use, without just compensation.*" Fifth Amendment (Emphasis added).
>
> "*nor shall any State deprive any person of* life, liberty, or *property, without due process of law*" Fourteenth Amendment, Section 1 (Emphasis added).

STATEMENT OF THE CASE

The Chief Counsel for the California Department of Water Resources in *amicus curiae briefs* filed in the courts below has said that the Department "considers the above-entitled matter to be one of the most significant in the history of California law."

This case involves the plight of two sexagenarian gentlemen who, as the sole shareholders of a small corporation (hereinafter referred to as "Niles"), tried to mine sand and gravel material from their property located in Fremont, California, in the County of Alameda.[1] Beginning in 1951, Niles successfully and for many years extracted sand and gravel from pits dug in accordance with local zoning and permit regulations.

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[1]Messrs. Scott and Clouser are the sole shareholders of Niles Sand & Gravel Co. which in turn owns all the stock of Inland Aggregates Co. The latter entity has a lease for mining the subject property.

The Alameda County Water District is a government entity created pursuant to state law, and certain of its facilities are located adjacent to the Niles property. The District's geographical limits of jurisdiction roughly coincide with the boundaries of the Niles Cone Water Basin, an underground reservoir of fresh water. In 1969 the District began to purchase water from the California Water Project[2] and to import that water from sources outside the District to the District's facilities adjacent to the Niles property. This was done for the express purpose of percolating that water into the ground to replenish and raise the level of the underground basin. The District's percolation activities did succeed in raising the underground basin level, but a direct consequence of this activity was that it also flooded Niles' sand and gravel pits, thereby substantially destroying Niles' ability to extract sand and gravel therefrom. Neither the fact of Niles' damage nor the cause thereof is in dispute.

Niles filed an inverse condemnation suit against the Water District in the Superior Court of the State of California, County of Alameda, alleging damages in excess of $800,000 by reason of the flooding.[3] Notwithstanding the above facts, which have never been questioned by the Water District or any court, the

[2]The California Water Project is constructed, operated, and maintained by the State Department of Water Resources.

[3]Because the trial court bifurcated the liability and damage issues, Niles has never had the opportunity to prove the specifics of its damage claims.

trial court ruled that the Water District was not liable to Niles for damages for inverse condemnation. The California Court of Appeal affirmed and the California Supreme Court denied a hearing. At all times throughout this litigation, Niles has demanded just compensation for the flooding under the due process precepts enunciated in the United States Constitution. Although other aspects of this action are still pending in the trial court, the judgment that Niles is entitled to no compensation is a final judgment.[4]

REASONS FOR GRANTING THE WRIT

1. THE LOWER COURT'S JUDGMENT IS IN SQUARE CONFLICT WITH THE PRECEDENTS OF THIS COURT WHICH REQUIRE JUST COMPENSATION FOR PERMANENT FLOODING RESULTING FROM STATE PUBLIC WORKS PROJECTS

In *United States v. Grizzard,* 219 U.S. 180, 183 (1910), this Court held that permanent flooding of private property by government body requires the conclusion that a compensable taking has taken place, citing *Pumpelly v. Green Bay Co.,* 13 Wall. 166 (1872), and *United States v. Lynah,* 188 U.S. 445 (1902).

Similarly, in *United States v. Kansas City Life Ins. Co.,* 339 U.S. 799 (1950), this Court held that

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[4]The trial court also determined, in a separate action, consolidated herewith for trial, that Niles was liable to the Water District for "waste" when, in attempting to protect itself from the flooding, Niles pumped water out into a nearby water course. As the damages stage of the waste claim has yet to be tried, it is not a final judgment susceptible to review by this Court.

the government was liable where, as a result of a public improvement, the water table under plaintiff's property rose, soaked that realty and blocked drainage therefrom in such a manner as to destroy its productivity. This was deemed to be "a taking" to the extent of the destruction caused. *Id.* at 809.[5]

The Fifth Amendment's "just compensation" guarantee is clearly binding on the states through the "due process" clause of the 14th Amendment. See, *e.g.*, *Chicago B. & Q. Co. v. Chicago,* 166 U.S. 226, 233-241 (1896); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922).

This Court has on numerous occasions reviewed activities of the states which conflicted with the federally protected guarantee where the pertinent facts were substantially similar to those present in the case at bar. In *Griggs v. Allegheny County,* 369 U.S. 84 (1962), this Court held that an infringement of private property rights above the ground caused by the design and construction of a county airport violated the 14th Amendment. *Id.* at 89-90. In so holding, Mr. Justice Douglas emphasized the existence of a statute that expressly dealt with the airport's *paying* for the acquisition of the kind of property interest that was taken from the plaintiff. *Id.* at

[5]See also, *Pashley v. United States,* 156 F. Supp. 737, 738 (Ct. Claims 1957), finding that plaintiffs were entitled to just compensation when their property was flooded as the result of a public improvement (a dam), which substantially destroyed its value for mining sodium sulphate.

89. In the case at bar, Niles unavailingly informed both the trial and appellate courts that a California statute similarly requires the Water District to acquire and pay for, through eminent domain proceedings, such private property rights as may be required by the Water District in its activities.[6]

As in *Griggs,* the existence of such a statute here supports a holding that Niles should be compensated for its loss of property to the state.

In *Pennsylvania Coal v. Mahon,* 260 U.S. 393 (1922), this Court reminded the states that it is constitutionally impermissible for a public entity to embark upon a project conferring a public benefit and yet shirk its constitutional duty to pay for what it obtained for the public:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416.

Like the case at bar, *Pennsylvania Coal* dealt with a situation in which acts by the state, though not *physically* confiscating mineral deposits, nonetheless

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[6]Cal. Water Code §60320(8) provides, in pertinent part: "For the purposes of replenishing the ground water supplies within the district, district shall have power . . . [t]o have and exercise the right of eminent domain and in the manner provided by law for *condemnation* of private property for public use, *to take* any property necessary to supply the district or any portion thereof with replenishment water. . . ." [Emphasis added]. In other words, the Water District's arguments to the contrary notwithstanding, the Legislature has termed its replenishment power a power to *take* subject to the law of *eminent domain* for which just compensation must be paid.

constituted a compensable taking of that mineral because the practical effect was to prevent the citizen from mining his ore. Pennsylvania had passed a law forbidding further mining on the property. Mr. Justice Holmes reasoned:

> "For practical purposes, the right to coal is the right to mine it . . . . What makes the right to mine coal valuable is that it can be exercised with a profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating it or destroying it." *Id.* at 414.

Surely, the act of flooding the Niles' operating pits has had the same material effect.

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2. THIS IS NOT AN ISOLATED CASE OF DENIAL OF JUST COMPENSATION, BUT RAISES ISSUES OF CRITICAL AND RECURRING IMPORTANCE TO WATER CONSERVATION AND SUPPLY PROJECTS

a. This Case Presents New and Novel Claims of Far Reaching and Recurring Significance

The *amicus curiae* briefs filed in this action by counsel for the California Department of Water Resources make clear why it considers this lawsuit to be one of the most important in the history of California water law. The Alameda County Water District, like all such districts throughout California, purchases water from the State Water Project, which is in turn constructed, operated and maintained by the Department.[7] The Project is "the largest single

[7]California Department of Water Resources' Application for Permission to Participate in Amicus Curiae, filed below, at pp. 2-3 thereof.

water resources development program not only undertaken in the U.S., but any place in the world."[8] The Department noted in its Amicus Curiae Brief that the Project's purpose is to overcome water distribution problems throughout California and that "[t]he issues to be decided in this case will affect all future [water] replenishment programs carried on by local [water] districts throughout the State, and, in turn, will affect the Department's plan to deliver water to local districts that are presently buying or planning in the future to buy water from the State Water Project."[9]

In the instant case, the Water District purposefully imported large quantities of water purchased from the State Water Project from outside the basin and artificially recharged the basin by injecting that water into the basin via percolating ponds (i.e., ponds with permeable bottoms—much like adding more and more water into sand at the beach). This caused the water table beneath the Niles' property to rise and flood its mining pits. In so flooding those pits, the Water District effectively forced Niles to provide, without compensation, a reservoir for the water of the District and at the same time materially damaged Niles' business. That is, the Water District effectively has been storing its water on Niles' property without paying for the injury to Niles directly and proximately caused thereby.

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[8]Amicus Curiae Brief of the State of California, filed by the Department below, at pp. 6-7 thereof.

[9]*Id.* at p. 10.

Testimony at trial by the Water District's own witness (referred to by the court below in its opinion, Appendix B at p. x) established that there were several alternative methods for accomplishing the goals of the Water District, and that the method chosen best satisfied its desire to find a means of utilizing underground facilities to their maximum feasible extent in order to conserve costs. In the name of "cost conservation," however, the State of California may not deprive citizens of their federally guaranteed rights.

b. The Requirement of Just Compensation Should Not Be Relaxed Merely Because the Taking Advances Conservation

The Alameda County Water District's own vision of this case is notable for its lack of perspective. In its brief in the Court of Appeal, it stated:

> "Finally, the importance of this case, as indicated in the Amicus Curiae Brief submitted by the State Department of Water Resources, cannot be minimized . . . . We see no purpose in enlarging upon the fact that the functions of the Alameda County Water District, especially in its replenishment activities, are a matter of statewide concern . . . . The Honorable Trial Court, at the conclusion of the evidence on this issue, pointedly asked counsel for [the District]: 'What considerations do you think will affect the upper courts?' Permit us again to respond. We respectfully submit that *the Supreme Court will find* (hopefully by affirmance) that *no liability* for replenishment of a natural underground basin affected by saline intrusion exists below its natural elevation (here, plus 20 above sea level) *for*

> *the following reasons: Water conservation* in this State *is of critical,* paramount and *overriding importance.* A natural underground reservoir was here created by God for the benefit of all overlying owners." Respondent's Brief, Exh. "A" thereto at pp. 60, 60 n. 25, and 61. (Emphasis added).

Niles does not dispute the importance of the *need* expressed by the Water District. Petitioners point out, however, that the State cannot evade its obligations under the federal Constitution in the name of necessity. All public takings are "necessary."

Petitioners are well aware that in these times there is a great need to preserve important natural resources including water. There is also a great need for additional funding to enable government to fulfill this public need. Yet where a state agency, with limited funds, embarks upon important public programs which result in the taking of and injury to private property, that agency must nonetheless bear the cost of that injury. The burden for the public improvement should not be borne by the one property owner alone. The California courts however have held in this case that the entirety of that burden of loss must be borne by Niles alone even though the benefit inures to the public.

This Court should reaffirm its commitment to the rule of just compensation, and hold in this case that even such important public concerns as conservation and the financial straits of local governments have not relaxed and cannot excuse that requirement.

3. THERE ARE NO ADEQUATE STATE GROUNDS FOR THE DECISION

a. The Prima Facie Elements of the Taking are Uncontradicted

(i) There is no dispute that Niles' property was flooded.

(ii) It has never been suggested that Niles had contracted away, implicitly or expressly, directly or indirectly, its property interest therein.[10]

(iii) There is no dispute that the Water District is responsible for the flooding. Indeed, it has repeatedly asserted that the raising of the water table on Niles' property was purposely done because the Water District wants to raise the water table in the entire area to even higher levels.

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[10]The Court of Appeal stated (see Appendix B, p. xix) that the trial court's injunction prohibiting Niles from continuing to pump out into a nearby watercourse the water flooded into its gravel pits by the Water District did not result in a compensable "taking" because the injunction only prevented Niles from doing that which it already was stopped from doing by way of the City of Fremont's use permit (discussed by the Court of Appeal in footnote 3 of Appendix B, pp. vi-vii). The clear response to this assertion is threefold: First, Niles has never claimed that being enjoined from pumping *out* the water constituted a taking; it was the District's flooding of the water *onto* the property of Niles that resulted in the taking. It simply doesn't make sense to say that a flooding of private property is not a "taking" because, *after* being flooded, the property owner is ordered to cease activities by which he tried to mitigate his damages. Secondly, the appellate court was clearly wrong in its descriptions of the effect of the permit (discussed in its note 3). As we pointed out in our petition for rehearing before them, the Court failed to recognize that the evidence showed that the permit they referred to was *amended* to *expressly* authorize Niles to take legal action against the Water District to protect itself from the rising water table. Third, if applicable at all, the permit goes only to the issue of value; that is, to the injury caused to Niles in terms of a decline in the value of its property in its highest and best use as a result of the flooding. It does not relate to whether there was compensable taking in the first instance; that is, to the liability issue before this Court.

b. The Water District Prevailed in the Court Below on the Basis of a Unique, and Hitherto Unknown, Affirmative Defense

The Water District disclaimed liability to Niles on the ground that it is the holder of a superior property right over the Niles property which it labeled a "state of nature" "public servitude." It asserted that it was the holder of this easement, that the Niles property was burdened by this easement, and that, accordingly, Niles could not complain of any diminished property rights since the activities of the Water District were wholly within the scope of that easement. The origin of this easement was not claimed to be a sale or lease or any other conventional transfer of property rights. Instead, the Water District asserted that this easement was created as a matter of law because in "the state of nature" the water table in the area was at 20 feet above sea level.[11] Because it has a public duty to replenish water supplies in the area, the Water District argued—and the courts below agreed—that it has the public duty to

[11] Just *when* the Water District thinks this "state of nature" existed has never been made clear. Their expert witness, Mr. Saylor, testified that records of ground water elevations for the years 1888-1912 had been analyzed by the Water District and that "they showed a ground water elevation in the principal recharge area of approximately 20 feet above sea level." Although in subsequent years the elevation varied dramatically (15.4 feet above sea level for 1914-1919, plus 9.2 feet for 1938-1942, a high since 1968 of 7.7 feet *below* sea level and a present level of 50 feet *below* sea level) and without regard to fluctuations within any given year in the wet and dry seasons, or to the advent, since 1912, of pumping, dikes, dams, reservoirs and industrial use, the Water District nonetheless took the figures for 1888-1912 as the "*natural* ground water level."

return the water table to the state of nature level, and that it can do so, more than 50 years after the water table was last at its "natural" level, completely immunized from the constitutional requirements of just compensation.

There is no historical foundation for this approach. In fact, Mr. Banks, who testified on behalf of the Water District, has published his own conclusions on the question of liability in cases such as this: "Storage of appropriated water in the underground for future use still leaves open the question of liability to the overlying owner. . . . Of course, a spreading agency might invade the property interests of the overlying owners in several ways. If too much water is stored in the underground the ground water level might rise and flood either structures or crops, in which case the injured party would be entitled to full compensation."[12]

That this expert should have failed to even consider the "state of nature" "public servitude" defense in his legal treatise on this subject demonstrates the lack of historical foundation for this approach and suggests its factitious nature.

The ramifications of this rationale are far-reaching and deserve consideration by this Court. For example, a government agency might seek to create park and recreational facilities for the public good by taking private property containing private homes, and destroy those private homes to plant trees. Could the

[12]Kreiger & Banks, *Ground Water Basin Management*, 50 Calif. L. Rev. 56, 72-73 (1962).

agency avoid paying just compensation for the destroyed homes on the ground that in "the state of nature" the property contained trees and not homes, and that the agency had a "public servitude" which allowed it to return the character of the property to its natural state?

c. Prior California Law Did Not Create the "Servitude" (or Easement) Asserted

(i) The Case Referred to by the Court of Appeal Did Not Create the Easement

Niles could not prevail if, when it acquired the subject property in 1951, it took subject to an easement then held by the State. If that were the case, and if the activities of the Water District were within the confines of that easement right, those acts would simply not amount to a compensable taking.

There is no suggestion in this case that the Water District held any easement prior to Niles' acquisition of the property in 1951, or at any time thereafter, by way of grant, license, lease, or any other form of property transfer, explicit or implied. Instead, the court below held that the easement was established by the California Supreme Court case of *Katz v. Walkinshaw*, 141 Cal. 138, 70 Pac. 663 (1902), *rehearing* 141 Cal. 116, 74 Pac. 766 (1903). But the *Katz* case did no such thing. The concept of one party having a property right which burdens the property of another and which allows that dominant holder to flood the burdened property was not involved in *Katz*, either directly or by the most strained of interpretations.

In *Katz,* plaintiffs were private property owners who sought an injunction against defendant neighbor who, by means of deep wells on defendant's property, was pumping as much water as she could get from a water basin underlying both her own and plaintiffs' property, not for use on her own land but to sell to distant purchasers. Plaintiffs complained that defendant was thereby unreasonably depleting the basin and interfering with plaintiffs' access to water from the basin. The California Supreme Court discarded the common law doctrine that would have favored defendant's position. It determined instead that the importance of fair allocation of important water resources requires that each person who owns property that lies over water has "correlative rights" in that water, which rights are mutual and reciprocal as to neighboring overlying owners, and that as a result the defendant could be enjoined from pumping the water for sale to the injury of her neighbors. 141 Cal. 116 at 120-121, 134, 136; 3 Witkin, *Summary of California Law, Real Property,* §595 at p. 2258 (8th Ed. 1973).

Katz, in affording reasonable access *to* the water, did not allow plaintiffs to flood defendant's land *with* that water. Thus, even if one could place the Water District in the position for which it has always contended (*i.e.,* as the "trustee" for *all* overlying landowners, holding the rights of *all* of them vis-a-vis Niles) such rights go only to regulating Niles' use of water on its own property and not to the Water District's alleged right to flood Niles' property with the Water District's water.

In sum, the *Katz v. Walkinshaw* correlative rights doctrine operates between property owners competing for a limited supply of water; it has not the remotest application to the rights of a public utility which wishes to assert a retroactive easement right on private property that would allow it to flood or otherwise injure that private property without paying just compensation.

(ii) A Sudden Change in Property Law May Itself Constitute a Taking

Had the California Legislature, just prior to the flooding, declared that *henceforth* an easement would burden Niles' property for the benefit of the Alameda County Water District, such a legislative act would amount to a "taking". The Legislature could not immunize the state from its constitutionally required obligation to pay for the taking by declaring that the easement being created was effective retroactively back to a date prior to the acquisition of the subject property by Niles (or all or some private property owners) in order to draw the conclusion that by reason of the *subsequent* acquisitions Niles and other private citizens acquired their property *subject to* that easement.

Similarly, as Mr. Justice Stewart stated in his concurring opinion in *Hughes v. State of Washington*, 389 U.S. 290 (1967), a change in property law effected by way of *judicial decision* can itself amount to a "taking," and if a state court attempts to retroactively transform private property into public property, the result is still a "taking."

In *Hughes,* a majority of this Court treated the claim of Mrs. Hughes against the State of Washington for oceanfront accretions in terms of whether federal or state law controlled and reversed the state supreme court by finding that it was the former. In his concurring opinion, Mr. Justice Stewart observed that the state supreme court decision under review had held that the state had terminated the kind of property right claimed by Mrs. Hughes long before her acquisition, *id.* at 294-295, and that a state supreme court decision as to a general proposition of property law "would *ordinarily* bind this Court." *Id.* at 295-296 (Emphasis added). Finding, however, that the state property rights question and federal due process question were "inextricably intertwined," and that "[l]ike any other property owner . . . Mrs. Hughes may insist . . . that the State not take her land without just compensation," he found that this Court could not "resolve the federal question whether there has been a taking without first making a determination of our own." *Ibid.*

In that regard, he stated:

> "To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. *But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of*

asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law *thus inevitably presents a federal question for the determination of this Court.* See Demorest v City Bank Co., 321 US 36, 42-43, 88 L ed 526, 530, 64 S Ct 384. Cf. Indiana ex rel. Anderson v Brand, 303 US 95, 82 L ed 685, 58 S Ct 443, 113 ALR 1482. The Washington court insisted that its decision was 'not startling.' 67 Wash 2d 799, 814, 410 P2d 20, 28. What is at issue here is the accuracy of that characterization.

"The state court rested its result upon Eisenbach v Hatfield, 2 Wash 236, 26 P 539, but that decision involved only the relative rights of the State and the upland owner in the tidelands themselves. The Eisenbach court declined to resolve the accretions question presented here. This question was resolved in 1946, in Ghione v State, 26 Wash 2d 635, 175 P2d 955. There the State asserted, as it does here, that Article 17 operated to deprive private riparian owners of post-1889 accretions. The Washington Supreme Court rejected that assertion in Ghione and held that, after 1889 as before, title to gradual accretions under Washington law vested in the owner of the adjoining land. In the present case, 20 years after its Ghione decision, the Washington Supreme Court reached a different conclusion. The state court in this case sought to distinguish Ghione: The water there involved was part of a river. But the Ghione court had emphatically stated that the same 'rule of accretion . . . applies to both tidewaters and fresh waters.' 26

Wash 2d 635, 645, 175 P 2d 955, 961. I can only conclude, as did the dissenting judge below, that *the state court's most recent construction* of Article 17 *effected an unforeseeable change in Washington property law* as expounded by the State Supreme Court.

"There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. *But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so.* Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment." 389 U.S. at 296-298 (Emphasis added).[13]

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[13]Petitioners were hesitant in their decision to place this lengthy quote in this brief, being mindful of the admonition in the Rules of this Court on long dissertations. However, for the reasons discussed in the text of the brief, we felt this opinion to be most ap-

Just as it was proper for this Court to examine the language of and state court history interpreting a provision of Washington's constitution in *Hughes,* in the instant case it is appropriate for this Court to independently examine the *Katz* doctrine rather than defer to the interpretation of the court below as to what that doctrine means and its effect on California property law. As in *Hughes,* the state court decision under review "worked an unpredictable change in state law thus inevitably present[ing] a federal question for the determination of this Court." In the same way that the older case relied on by the Washington Supreme Court in *Hughes* could be reviewed by this Court and be deemed inapplicable to Mrs. Hughes' claim, so too a review of *Katz* is necessary and reveals a failure to support the easement claimed by the Water District.

No California court has come close to interpreting *Katz* in the manner ascribed by the Court of Appeal in this case.

On the contrary, until this case, California case law, without reference to any easement or servitude of any kind whatsoever, has held that public agencies are liable for damages where their public activities result in flooding or seepage upon the plaintiff's property. See, *e.g., Clement v. State Reclamation Board,* 35 Cal.2d 628, 641, 220 P.2d 897 (1950) (compensation for injury to property owner due to flooding of the surface of his land as the result

propriate to defeat the possible inference that in a case such as this, federal review should give way to deference to the Court of Appeal's interpretation of past California case law.

of a public project); *Tormey v. Anderson-Cottonwood Irrigation District,* 53 Cal.App. 559, 568, 200 Pac. 814 (1921), and *Powers Farms v. Consolidated Irrigation District,* 19 Cal.2d 123, 126, 119 P.2d 717 (1941) (compensation to owner where damage due to seepage of water carried through the intervening soil to the adjoining land of the plaintiffs); *Holtz v. Superior Court,* 3 Cal.3d 296, 311 n. 17, 90 Cal.Rptr. 345 (1970) (citing favorably to an Iowa Supreme Court case where water escaped from city's underground water facility onto the premises of plaintiff and the city was held liable).

In fact, the Water District itself has acknowledged that the issue of the "state of nature" "public servitude" easement defense calls for a judicial decision of first impression.[14]

Accordingly, the opinion of the court below, like the Washington Supreme Court decision in *Hughes,* must be seen as constructing and effectuating an "unforeseeable," "sudden" change in state property law, effecting a retroactive transformation of private into public property for which the Fifth and Fourteenth Amendments require just compensation.

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[14]In its brief in the appellate court, for example, the Water District stated:

> "All parties recognize this case is one of first impression. The Honorable Trial Court determined, and appellate courts must now face the question of whether or not the public has indeed a water rights servitude in an underground basin and the extent of that servitude." (Respondent's Brief, at pages 29-30.)

d. The Police Power Defense Does Not Apply

In *Pennsylvania Coal, supra,* 260 U.S. 393 (1922), the state tried to defend itself on the police power theory. This Court found that the state had stretched the doctrine too far, noting that "[t]he greatest weight is given to the judgment of the legislature, but it is always open to interested parties to contend that the legislature has gone beyond its constitutional power." *Id.* at 412. It concluded that the destructive effect of the statute went far beyond the proper confines of the police power. *Id.* at 416.

In the instant case, the trial judge expressly rejected the Water District's claim that the flooding of Niles' property was immunized by the police power. Instead, it "supported" the judgment solely on the "state of nature" "public servitude" defense discussed previously. The Court of Appeal expressly recognized this (Appendix B, p. xx n.12) but nonetheless, in affirming the trial court, added the police power defense as an "alternative ground (Appendix B, p. xx)," referring to Article IV, §3 of the California Constitution and to two state cases interpreting that provision. The constitutional section reads:

> "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof

> in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; *provided, however,* that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

Simply stated, this provision declares that it is the policy of the State to prevent waste; that no citizen has the *right* to an uninterrupted flow of water from natural streams or water courses where waste would thereby occur; and that California's legislature may enact laws in furtherance of the policy enunciated in the preceding sentences.

A similar conclusion is drawn from the two cases cited by the Court below (Appendix B at p. xxii).

Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 683, 701, 22 P.2d 5 (1933), and *Joslin v. Marin Mun. Water Dt.,* 67 Cal.2d 132, 60 Cal. Rptr. 377, 429 P.2d 889 (1967), both hold that damage to private property caused by the *cut off of the water* supply is not compensable where waste of water would otherwise occur. Neither the constitutional provision nor the case law thereunder immunize the State for flooding another's land *with* water.

Indeed, the California Supreme Court has specifically held that in an inverse condemnation action to recover damages for the injury caused by government flooding, the defendant cannot defend on the basis of Art. IV, §3. In *Natural Soda Products Co. v. City of Los Angeles,* 23 Cal.2d 193, 199, 143 P.2d 12 (1943), Mr. Justice Traynor stated that this provision, "designed to insure a reasonable division of a limited water supply [has] never been construed as requiring a particular disposition of surplus water, least of all a disposition harmful to the recipient. The constitutional mandate forbidding 'the waste or unreasonable use of water,' far from requiring, actually forbids a disposition that would entail not only a waste of water but damage to valuable natural resources."

The concurring opinion of Mr. Justice Stewart in the *Hughes* case, *supra,* clearly allows this Court to examine for itself the relevant state authorities. Indeed, in *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 743-755 (1950), this Court embarked on a lengthy

analysis of this very provision of the California Constitution, seeing fit to review in great detail both California decisional and legislative history related to it, albeit in a case whose basic facts were not similar to those in the matter at bar.

Accordingly, this Court may appropriately determine (as did the trial court) that there is no basis for application of the police power defense and that the appellate court's "alternative ground" is improper.

CONCLUSION

A denial of just compensation in this case conflicts with the requirements of the Due Process Clause as interpreted by many decisions of this Court, including *Griggs* and *Pennsylvania Coal.*

Niles has demonstrated the *prima facie* elements of its inverse condemnation claim and this is not disputed. Instead, the Water District has asserted two affirmative defenses: The "state of nature" "public servitude" easement right and the police power. Both defenses amount to a retroactive justification for the flooding and the confiscation of the Niles property without just compensation. The easement defense rests upon a twisted analyses of a doctrine which governs the allocation of limited supplies of

water. The police power defense was supported by a tortured application of state court decisions and state constitutional provisions censuring waste. Both defenses constitute an aggravated departure from a mass of state court decisions consonant with the federal constitution and requiring payment of just compensation.

This erroneous determination must be seen for what it really is: A hindsight excuse rendered solely in order to save money for the State. The appellate court decision improperly permitted the State to confiscate Niles' property by flooding it in the course of its statewide replenishment program and to use that property as a reservoir for the storage of water without paying for the injury caused thereby.

It is necessary that the horse finally be placed before the cart by this Court: The State is simply not immune from its constitutional obligations because Niles may have wasted water when it pumped *out* those waters with which it was being inundated. Instead, the sole question here is whether the State can, in the first place, put that water *in* without paying just compensation. That question must be answered by this Court with a clear and resounding "no!" so that the world's largest water resources development plan shall be operated and maintained in a manner consistent with the precepts of the Due Process Clause.

For the foregoing reasons, the petition for Writ of Certiorari should be granted.

Dated, San Francisco, California,
July 29, 1974.

Respectfully submitted,
EDWIN C. SHIVER,
PETER V. BRUCHER,
KENNETH D. ROBIN,
Attorneys for Petitioners.

BRUCHER & SHIVER,
Of Counsel.

(Appendices Follow)

Appendix A

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

May 8, 1974

I have this day filed Order
Hearing Denied

In re: 1 Civil No. 32,099

Alameda Co. Water Dist.

vs.

Niles Sand and Gravel Co., Inc., et al.

Respectfully,
G. E. Bishel
Clerk

Appendix B

In the Court of Appeal
State of California
First Appellate District

DIVISION FOUR

1 Civil No. 32,099

Alameda County Water District,
a public corporation,
Plaintiff and Respondent,
vs.
Niles Sand & Gravel Co., Inc.,
a corporation, et al.,
Defendants and Appellants.

[Filed Mar. 14, 1974]

OPINION

As will appear in further detail, the appeals herein present the following factual situation: Respondent Alameda County Water District maintains a program through which it regularly replenishes the natural underground water supply within its territorial jurisdiction by forcing stored water below ground in a process of percolation. Appellants are the operators of deep "pits" (or "quarries") from which they extract and sell commercial sand and gravel. The district's

replenishment program raised the underground water table to a level below which appellants' pits had been excavated, thereby causing or contributing to flooding in the pits and the interruption of appellants' business. Appellants pumped out and discharged the water, causing substantial quantities of it to run off into San Francisco Bay and to be lost.

Appellants commenced an action against the district (Alameda County Superior Court No. 401131) in which they sought damages upon the basis that the flooding of their pits constituted a "taking" or "damaging" of their property, by the district and for a public use, which was compensable by way of inverse condemnation under article I, section 14 of the California Constitution.[1] In another action subsequently commenced against appellants in the same court (No. 403003), the district sought to enjoin them from discharging and wasting its water and to recover damages from them for the loss of water previously wasted. In a counterclaim and cross-complaint filed in action No. 403003, appellants again claimed the right to recover damages by way of inverse condemnation.

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[1]As pertinent, article 1, section 14 provides: "Private property shall not be taken or damaged for public use without just compensation having been made to . . . the owner . . ." (As to the well-settled concept of inverse condemnation, under this constitutional provision as "self-executing," see, e.g., *Rose v. State of California* (1942) 19 Cal.2d 713, 717-725 [123 P.2d 505]; 3 Witkin, Summary of Cal. Law (7th ed. 1960) Constitutional Law, §§ 209, p. 2021, 223, p. 2033.)

The trial court ordered the two actions consolidated for purposes of trial and birfurcated the trial as between the issues of liability and damages. After a nonjury trial of the liability phase of the actions as consolidated, the court found in favor of respondent district and entered a judgment which (1) enjoined appellants from discharging water from their pits without the written consent of the district or the further order of the court; (2) reserved jurisdiction to determine the amount of damages, if any, incurred by the district for waste by reason of the loss of water previously discharged from the pits; and (3) denied inverse condemnation relief to appellants as sought in their complaint in action No. 401131 and in their counterclaim and cross-complaint in action No. 403003.

The appeals are from the judgment and from an order which (as will appear) was collateral and incidental thereto. The principal question presented is whether the flooding of appellants' pits constituted a "taking" of their property which is constitutionally compensable under the concept of inverse condemnation. (See fn. 1 and accompanying text, *ante.)*

Facts

Although the record on appeal is lengthy and intricate, the material facts are relatively simple and are not disputed. The record of the single trial supports the following recital thereof:

Appellant Inland Aggregates Company (a corporation) is the lessee, and appellant Niles Sand & Gravel

Co., Inc. (a corporation) is its sublessee,[2] of certain land located in the City of Fremont in Alameda County. At all pertinent times since 1951 or 1952, appellants had been engaged in the business of "harvesting" (i.e., extracting), processing and selling commercial sand and gravel from deep pits excavated by them on the property mentioned. At all such times, their operations were conducted subject to land use permits issued by the County of Alameda at first and, later, by the City of Fremont.[3]

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[2]The facts here recited are as alleged in appellants' complaint in action No. 401131 and their cross-complaint in action No. 403003. The trial court found that appellants were "owner[ ]" thereof. The distinction is not significant for purposes of the present appeals; we may presume that appellants held the subterranean rights in the property ordinarily held by an owner in fee.

[3]During the events here involved, appellants' operations were conducted under a conditional use permit issued by the City of Fremont, in 1968, pursuant to pertinent sections of its municipal code. According to the evidence (and to an unchallenged statement in respondent district's brief), the permit was revocable by the city. Two of the numerous conditions of the permit, which was received in evidence at the trial hereof, required the express approval of respondent district prior to appellants' "modification of ground slopes" in their sand and gravel pits or the filling of excavated areas; another required them to comply with the district's storm drainage requirements.

Another condition (hereinafter "Condition No. 22") expressly provided that appellants "*shall cooperate with the Alameda County Water District* [respondent] *to the end that water pumped in connection with* . . . [their] . . . *operations shall not be wasted to San Francisco Bay nor shall ground water percolation capacity be diminished in quality or quantity.*" (Italics added.)

The evidence herein also shows the following: In 1969, appellants formally applied to the Fremont City Council for modification or deletion of Condition No. 22 by reason of "the apparent impracticability and inequity of said condition if interpreted to prohibit pumping of water of [*sic*] the quarry pits." After a detailed review of Condition No. 22 and of appellants' current operations (including the facts later shown in evidence herein), the council adopted, by resolution, "Findings and Conclusions" in which it denied modification or deletion of the condition as sought. The council expressly determined that "[t]he degree of coopera-

Respondent is a county water district organized pursuant to the County Water District Law (present division 12 of the Water Code [commencing with § 30000].) It was formed in 1914 for the principal purposes of conserving the ground water supply in the Niles Cone Ground Water Basin (hereinafter "the Niles Basin," or "the basin") and protecting it against saline intrusion from San Francisco Bay. In addition to the powers and duties vested in it by the County Water District Law, the district has certain additional powers and duties by virtue of an uncodified 1961 enactment which affected the district alone and which pertain to "replenishment of ground waters." (Stats. 1961, ch. 1942, § 1 et seq., p. 4092 et seq.)[4]

The Niles Basin is an underground water basin which was geologically formed, over thousands of years, by the deposit of sand, gravel and other alluvial materials from the flow of Alameda Creek. The lateral dimensions of the basin approximately correspond with the territorial surface boundaries of respondent district as fixed by law. Since 1935, the dis-

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tion required pursuant to Condition No. 22 by . . . [appellants] . . . is that there not be a 'substantial wastage' of water as a result of quarry operations," that appellants had demonstrated "inadequate cooperation," and that they had violated Condition No. 22, by causing wastage of water to San Francisco Bay during a designated period in 1969. The council's resolution apparently motivated appellants in commencing their action against the district (No. 401131) thereafter.

[4]The 1961 enactment is entitled as follows: "An act providing additional powers and duties for the Alameda County Water District (organized pursuant to the County Water District Law, commencing with Section 30000 of the Water Code), relating to the replenishment of ground waters." (Stats. 1961, ch. 1942, p. 4092.)

trict has been engaged in the continuous water replenishment (or "recharge") program within the basin, whereby it collects water on the land surface and stores it in sufficient quantity so that the pressure of its weight and density forces it to percolate through the underlying soil and into the basin proper.[5] This process inevitably results in raising the underground water table.

Appellants' sand and gravel pits, which overlie the Niles Basin on the surface, are located within the territorial boundaries of the district and in the "major recharge area" of the water replenishment program described above. The surface elevation in the area of the pits is approximately 60 feet above sea level. In 1969, some of the pits had been excavated to depths which were as much as 120-125 feet below ground level and 60-65 feet below sea level. The elevation of the underground water table in the area, in a "state of nature" (i.e., in "that condition which would have existed without diversion from the watershed and/or extractions from the basin"),[6] was at least 20 feet above sea level (i.e., as much as 80-85 feet above the maximum depth to which appellants had excavated). Because appellants consequently ex-

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[5]It is undisputed that the district conducted its water replenishment program pursuant to, and within, the authority vested in it by statute. (See the County Water District Law [Wat. Code div. 12 (commencing with § 30000)] and the 1961 enactment cited at fn. 4, *ante*.) It is also undisputed that the district owns the ground water in the Niles Basin as trustee for all the overlying surface owners, located within its boundaries.

[6]The definition of a "state of nature," here recited, was adopted by the parties in various documents received in evidence at the trial.

pected to encounter water below ground (as they inevitably did), they installed facilities with which they pumped water from their pits, causing it to run off to San Francisco Bay through the channel of Alameda Creek. During the period of approximately three years which preceded the trial, the water wasted by reason of this pumping operation amounted to several billion gallons; at the time of trial, the rate of wastage was five million gallons per day. The latter amount would meet the average daily water needs of a city of 30,000 people. During the period mentioned, the situation had thus reached the point where the district and appellants were working at complete cross-purposes; as the district was replenishing the water in the Niles Basin, appellants were draining it.

These events resulted in the actions between the parties as described above.[7] At the single trial of the liability phase thereof (also as described above, and in addition to the evidence previously summarized), the trial court heard evidence to the general effect that the public's water needs were critical throughout California and within the territorial boundaries of re-

[7]A third action (No. 400155) had been commenced by the district, seeking similar injunctive relief and damages from other entities (collectively called "Jamieson" herein) who were quarry operators engaged in activities similar to appellants' in pits nearby. The Jamieson action was consolidated and tried (as to the liability phase) with the two actions involving the district and appellants. After the trial court had filed its "Memorandum Decision" and had filed findings of fact and conclusions of law in the three consolidated actions (as hereinafter recited), Jamieson and the district stipulated to a judgment in the district's favor in the Jamieson action. Consequently, neither the action nor Jamieson is involved on the present appeals.

spondent district. Evidence was also introduced concerning the necessity and character of underground water replenishment programs and, specifically, the one conducted by the district. For example, Harvey Banks (who was called as an expert by the district and whose qualifications as such were, and are, unchallenged) testified that such programs are conducted "primarily because of the absolute imperative necessity to make the maximum conservation of local runoff in the various streams, plus the necessity of providing for regulation of water supplies provided by . . . [various public water projects] . . . [T]he necessity of doing this is in part due to the fact that our surface [water] storage capacity in this State is nearly exhausted, particularly in the Central Valley, here in the [San Francisco] Bay Area, in the San Joaquin Valley, and Southern California. A few remaining sites are very difficult to build upon and they are extremely expensive, so it becomes imperative to utilize the underground resources to the maximum feasible extent in order to both conserve water and to conserve costs."

In the testimony of Banks and other witnesses, it was also shown as follows: Adequate fresh water replenishment is essential to prevent salt water intrusion in the Niles Basin because of its immediate proximity to San Francisco Bay. Since 1935, respondent district has sought to maximize the quantity and supply of water within the basin, and to preserve the quality of water within it, by maintaining the "bayward gradient" and thereby minimizing salt water intrusion.

In order to carry out its mandate under the Alameda County Water District Law, and the 1961 law affecting it (see text at fn. 4, *ante*), the district has contributed to the enactment of legislation enabling it to satisfy its needs for supplemental water to meet the demands in the basin; has acquired percolation pits for purposes of replenishing the underground supply of water within its geographical area; has obtained from the State of California valid water rights to divert water from Alameda Creek and place it in underground storage for later beneficial use; and has replenished the water supply in the Niles Basin by capturing and holding other water for the same use. Banks further testified that the district's replenishment program has prevented the Niles Basin from being lost to salt water intrusion and that, if such loss had occurred, appellants' sand and gravel pits would presently be standing in salt water.

The consolidated cause having been submitted for decision on the liability phase at the conclusion of the trial thereof, the trial court entered a "Judgment of Injunction" on June 1, 1971, which enjoined appellants and Jamieson (see fn. 7, *ante*) from discharging water from their pits without the written consent of the district or "further order of this court." On October 15, 1971, the court signed a "Memorandum Decision," spelling out the substance of its prospective decision in favor of the district and against appellants and Jamieson. On November 15, 1971, appellants noticed a motion for an order dissolving or modifying the "Judgment of Injunction" entered on June 1,

1971. On January 7, 1972, the trial court entered an order denying this motion.

Later in January, 1972, the court filed a single set of findings of fact and conclusions of law, in favor of the district, under the caption of all three actions. (See fn. 7, *ante.)* Among other findings of the pertinent facts as summarized above, the court specifically found that the natural ground water elevation of the Niles Basin was at least 20 feet above sea level, that the district's water replenishment program in the basin served a beneficial public purpose, and that appellants' discharge of water from their pits was detrimental to the program and the basin alike.[8]

Among its "Conclusions of Law," the trial court stated: "I. That the property of . . . [appellants] . . . overlying the Niles Cone Ground Water Basin is *sub-*

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[8]These findings were stated as follows:

"V. That the ground water elevation of the underground basin or reservoir in the major recharge area *in a state of nature* was established . . . as a level of more than 20 feet above sea level.

". . . . . .

"VII. That since its formation in 1914, the district has continuously extended its efforts to replenish the basin and replace the overdraught on the original water supply, said overdraught being the effect of the domestic, commercial, and agricultural users of water which the advent of increased population had *on the state of nature.*

"VIII. That the replenishment activity on the part of the district to offset the overdraught is for a *beneficial public purpose.*

". . . . . .

"XIV. That . . . [appellants] . . . , to offset the intrusion of water into the quarry pits, pumped water from them and this water was discharged in such a way as to permit it to run off into San Francisco Bay in substantial quantities, *to the general detriment of the water basin and the restorative program of the . . . district.*" (Italics added.)

ject to a public servitude for water and water conservation purposes. II. That the ground water elevation of said *public servitude* in the major recharge area of . . . [the basin] . . . is elevation 20-feet [sic] above sea level. III. That all water within said *public servitude,* whether present in said basin by replenishment or otherwise, is subject to the control of . . . [the district]. . . . IV. That . . . [appellants have] . . . *property rights in the water within the public servitude of said basin only to a correlative and reasonably beneficial use thereof as overlying owners.* V. That . . . [appellants have] . . . not established the existence of a property interest affected by any of the activities of the district. VI. That the pumping and discharging of water from the gravel pits beginning in 1968 by . . . [appellants] . . . constituted a non-beneficial use of said water. . . ." (Italics added.)

Pursuant to these findings and conclusions, the trial court entered the aforementioned judgment against appellants on March 7, 1972. As indicated above, but more specifically summarized here, the judgment (1) enjoined appellants from discharging water from their sand and gravel pits without the written consent of the district, and from doing so, in such manner as to cause discharged water to run off into San Francisco Bay "without the further written consent of . . . [the district] . . . or further order of this court": (2) reserved jurisdiction in action No. 403003, to determine the amount of damages, if any, incurred by the district for the "nonbeneficial use and wastage of water" previously pumped from appellants' pits; and

(3) denied inverse condemnation relief to appellants as sought in their complaint in action No. 401131 and in their cross-complaint in action No. 403003.

The three appeals before us are (1) from the just-*mentioned judgment as entered in action No. 401131*, (2) from the same judgment as entered in action No. 403003, and (3) from the trial court's order of January 7, 1972, denying appellants' motion for dissolution or modification of the "Judgment of Injunction" entered on June 1, 1971. Among the three notices of appeal indicated, two are addressed to the same judgment. The order of January 7, 1972 (to which the third notice is directed), pertained to an injunction which was interlocutory in nature and which was essentially merged into the main judgment. Accordingly, the matters presented on all three appeals may be considered on the one taken from the main judgment alone. For the reasons next stated, appellants' contention on that appeal cannot be sustained; we affirm the judgment and the order mentioned.

The Trial Court Correctly Applied the "Correlative Rights Doctrine" in the Case

Appellants challenge the judgment upon the ground that it denies them relief in inverse condemnation as assertedly guaranteed them by article I, section 14, of the California Constitution. (See fn. 1, *ante*.) Their constitutional claim rests upon the arguments that they have the absolute right to use their land, to unlimited depths below its surface, because Civil Code section 829 vests in them "the right to the sur-

face and to everything permanently situated beneath . . . . it";[9] and that the flooding of their pits below ground level, as a result of the district's water replenishment program, has interfered with their subterranean rights in their land, and with their sand and gravel business, so as to constitute a "taking" or "damaging" of their property which is for a public use and for which article I, section 14, therefore entitles them to compensation.

Appellants address this argument, to the judgment itself, in terms of the trial court's conclusions of law in which it declared that their land was subject to a "public servitude for water and water conservations purposes" up to a designated elevation in the subterrain of the Niles Basin. (Conclusions of law I and II, quoted *supra.*) According to the argument, the judgment which followed has the unconstitutional effect of denying appellants the compensation guaranteed them by article I, section 14, because the trial court therein contrived to "create a new property interest for the benefit of a public agency, label it a 'servitude,' and thereby allow that agency to escape liability to the landowner for damages in inverse condemnation."

The trial court did not do these things. Among its conclusions of law mentioning the "public servitude"

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[9]Civil Code section 829 provides in full that "The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it."

As previously indicated, it may be presumed that appellants' underground rights in their *land* are those of an owner in fee. (See fn. 2, *ante.*)

in the Niles Basin, the court further declared that appellants have "property rights in the water *within the public servitude of said basin only to a correlative and reasonably beneficial use thereof as overlying owners.*" (Conclusion of law No. IV, quoted *supra* [italics added].) Read together, the conclusions unmistakingly express the court's application of the so-called "correlative rights doctrine"[10] which pertains, not to surface owners' use of their *lands* within an underground water basin, but to their use and disposition of *water* percolating within it.

The correlative rights doctrine was first pronounced in a landmark case (*Katz v. Walkinshaw* (1903) 141 Cal. 116 [74 P. 766]) in which the Supreme Court, in a decision upon rehearing (see *id.* at p. 120), developed and reiterated the doctrine as adopted in its original decision. (*Id.* at pp. 137-138 et seq.) Under the facts presented in *Katz,* the court was called upon to balance the effect of the common law maxim "Cujus est solum, ejus est usque ad inferos,"[11] as to

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[10]In its "Memorandum Decision" signed on October 15, 1971, the trial court further indicated that it was resolving the case by applying the doctrine mentioned. We have resorted to the memorandum, as we may do, "for the purpose of discovering the process by which . . . [the trial judge] . . . arrived at his conclusion." (*Henderson v. Fisher* (1965) 236 Cal.App.2d 468, 472 [46 Cal. Rptr. 173]. Cf. 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 230, pp. 4220-4221.)

[11]"The owner of the soil owns to the lowest depths." (Ballentine's Law Dict. (3d ed. 1969) p. 295.) The substance of the two-directional maxim which encompasses this one ("Cujus est solum, ejus est usque ad coelum et ad inferos" ["The owner of the soil owns to the heavens and also to the lowest depths": *ibid.*]) is enacted in Civil Code section 829, upon which appellants rely with respect to their subterranean use of their *land.* (See text at fn. 9, *ante.*)

waters percolating below ground, against the realities of the underground water situation in California. (*Id.* at pp. 120-121, 125-128, 139). Rejecting the maxim under compulsion of the realities (see *id.* at p. 143; see also Krieger and Banks, *Ground Water Basin Management* (1962) 50 Cal.L.Rev. 56, 72-73) the court held that, as between the owners of land overlying strata of percolating waters, the rights of each to the water are limited, in correlation with those of others, to his "reasonable use" thereof when the water is insufficient to meet the needs of all. (*Id.* at pp. 135-136, 137, 143-144; *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926 [207 P.2d 17]; *California Water Service Co. v. Edward Sidebotham & Son* (1964) 224 Cal.App.2d 715, 725 [37 Cal.Rptr. 1]; 3 Witkin, Summary of Cal. Law (8th ed. 1973) Real Property, § 595 ["Correlative Rights Doctrine"], pp. 2258-2259.

By reason of the authorities just cited, the trial court correctly applied the correlative rights doctrine in principle. Once it had been shown to apply, the questions became factual. Resolving the first one, the court found that the elevation at which the doctrine applied in the "major recharge area" of the Niles Basin was 20 feet above sea level. (See finding no. V, quoted in fn. 8, *ante.*) It further found in effect that appellants' pumpoff and discharge of water amounted to an *unreasonable use* thereof, because it operated "to the general detriment of the water basin and the restorative program of the . . . district." (See finding no. XIV, *ibid.*) As these findings are supported by

substantial evidence, it follows that the district, as trustee for all surface owners within the basin (see fn. 5, *ante*), was entitled to the injunctive relief ordered. (*Katz v. Walkinshaw, supra,* 141 Cal. 116.)

The trial court was also correct in using the word "servitude" to connote the obligation imposed by the doctrine upon appellants, as landowners in the basin, to refrain from discharging more than their reasonable share of the underground water therein; the term ("servitude") is commonly used with reference to such obligations when imposed by law, and limiting the use of lands lying in a particular geographical area, where an overriding public interest requires it. (See, e.g., *Colberg Inc. v. State of California* ex rel. *Dept. Pub. Wks.* (1967) 67 Cal.2d 408, 420 [62 Cal.Rptr. 401, 432 P.2d 3] [speaking to the servitude with which "the law of California burdens property riparian or littoral to navigable waters"].) The court also properly denominated the "servitude" as "public," because the right to enforce it is held by a public agency (respondent district) as trustee for all surface owners and suppliers of water (i.e., the "public") in the Niles Basin. (See fn. 5, *ante.*)

In response to appellants' explicit basis for challenging the judgment, we also point out that the court did not, as they put it, "create a new property interest" in respondent district. In its pertinent conclusions of law (quoted *supra*), the court merely declared the *existence* of the "public servitude" in the Niles Basin and fixed its level. The "servitude" having been declared by application of the correlative rights doc-

trine, which originated in 1903 (*Katz v. Walkinshaw, supra,* 141 Cal. 116), it has applied to surface owners in the basin (as throughout California) ever since, and has accompanied any devolution of title by which appellants hold the property in question.

Appellants Were Properly Denied Inverse Condemnation Relief Because There Was No "Taking" or "Damaging" of Their Property

The trial court having correctly applied the correlative rights doctrine as discussed above, appellants are not entitled to relief in inverse condemnation for two reasons. In the first place, the judgment enjoins them from pumping underground water from their pits without the consent of respondent district or "the further order of . . . [the trial] . . . court." The second provision assures them of judicial protection against arbitrary or unreasonable action by the district in withholding consent. The effect of the first one is to decree that the correlative rights doctrine compels the restriction of appellants' pumping operations to the extent required by the district's discharge of its public (and undisputed) duty to prevent waste of underground water in the Niles Basin. The first provision therefore amounts to no more than a judicial imposition of the restraint which was already imposed upon appellants as an explicit condition of the revocable use permit which controlled the use of their land. (See fn. 3, *ante.*) As they have lost no rights which they had in fact, there has been no actual "taking" or "damaging" of their property which is compensable under article I, section 14. (See

fn. 1, *ante*; compare *Rose v. State of California, supra,* 19 Cal.2d 713, 728-729.)

Appellants Were Properly Denied Inverse Condemnation Relief Upon The Theory of Respondent District's Police Powers

The second reason that appellants are to be denied inverse condemnation relief presupposes that their property rights have at least been "damaged" (see Cal. Const., art. I, § 14 [fn. 1, *ante*]) by the imposition of the correlative rights doctrine upon their land and their rights as surface owners. If this has occurred, we agree with respondent district's argument that the event is not constitutionally compensable because it is the result of the district's exercise of its police powers. (The argument is presented in the alternative; in the discussion which follows, we adopt it as an alternative ground of decision.)[12]

Article XIV, section 3 of the California Constitution expressly states: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or un-

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[12]Appellants pointed out at oral argument that the trial court had not viewed the situation as permitting invocation of the police-powers theory. Their observation is correct: the theory is not expressed in the court's findings or conclusions (quoted *supra*), and the trial judge apparently disavowed it in his "Memorandum Decision." (See fn. 10, *ante*.) However, the judge's view is not binding on appeal: accepting respondent district's argument based upon its police powers, we may cite it in support of the judgment under the familiar rule that we may affirm the latter, upon any valid ground appearing, even if we disagree with the trial court's reasons for arriving at it. (6 Witkin, Cal. Procedure [*op. cit. supra*] Appeal, § 226, pp. 4215-4216.)

reasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. . . . This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

After this provision had been adopted in 1928, the Supreme Court squarely held that it expressed a legitimate exercise of the police power of the state. (*Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 701 [22 P.2d 5].) Distinguishing its effect from that of article I, section 14, the *Gin S. Chow* court stated: "There is a well recognized and established distinction between a 'taking' or 'damaging' for public use [as contemplated in article I, section 14] and the regulation of the use and enjoyment of a property right for the public benefit. The former falls within the realm of eminent domain, and the latter within the sphere of the police power. That the constitutional amendment . . . [article XIV, § 3] . . . is a legitimate exercise of the police power of the state cannot be questioned. It is the highest and most solemn expression of the people of the state in behalf of the general welfare. The present and future well-being and prosperity of the state depend upon the conservation of its life-giving waters." (*Id.* at p. 701.)

The police power thus endorsed by the Constitution applies "'to all water rights enjoyed or asserted in this state, whether the same be grounded on the riparian right *or the right,* analogous to the riparian right,

of the overlying land owner, or the percolating water right, or the appropriative right.' (Citation.)" (*Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 138 [60 Cal.Rptr. 377, 429 P.2d 889] [italics added].) On innumerable occasions, the Legislature has implemented the constitutional mandate by enacting statutes which stress the equation of the state's water resources with the public "health, safety and welfare"; such statutes have been directly addressed to ground water basins (see, e.g., Wat. Code, § 12922.1), and are included within the special enabling law under which respondent district carries on its water replenishment program. (See Stats. 1961, ch. 1942, § 22, p. 4103.)

The evidence received at the trial hereof, as summarized *supra,* fully demonstrates that the activities of the district have been carried on in the exercise of its police powers. Accordingly, the effect thereof upon appellants' property is not compensable under article I, section 14, of the Constitution. (*Gin S. Chow v. City of Santa Barbara, supra,* 217 Cal. 673 at pp. 700-703, 705. See *Colberg, Inc. v. State of California* ex rel. *Dept Pub. Wks., supra,* 67 Cal.2d 408 at p. 420.)

The disposition hereinafter ordered reaches the subject matter of all three notices of appeal filed herein.

The order entered on January 7, 1972, and the judgment entered on March 7, 1972, are affirmed.

Rattigan, Acting P. J.

Devine, J.,* and Christian, J., concurred.

*Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

Appendix C

In the Superior Court of the State of California
In and for the County of Alameda
Before the Honorable Lyle E. Cook, Judge
Department No. 14

Alameda County Water District, a public corporation, Plaintiff, vs. George G. Jamieson, et al., Defendants.	No. 400155
George G. Jamieson, et al., Cross-Complainants, vs. Alameda County Water District, a public corporation, Cross-Defendants.	
Niles Sand and Gravel Co., Inc. a corporation, et al., Plaintiffs, vs. Alameda County Water District, a public corporation, Defendants.	No. 401131
Alameda County Water District, a public corporation, Plaintiff, vs. Niles Sand and Gravel Co., Inc. a corporation, et al., Defendants.	
Niles Sand and Gravel Co., Inc. a corporation, et al., Cross-Complainants, vs. Alameda County Water District, a public corporation, Cross-Defendants.	No. 403003

[Filed October 15, 1971]

NOTE: Petitioners' footnote: Consolidated for trial were the following issues: (1) Petitioners' claim that the Water District was liable for damages in inverse condemnation, (2) a similar claim by another sand and gravel quarry operator against the Water District, and (3) the claim of the Water District that both petitioners and that other claimant were guilty of waste. Only issue (1) is reviewable by the U.S. Supreme Court at this time.

MEMORANDUM DECISION

These consolidated actions involve, in the portion of the proceeding now under consideration, claims for damages in alleged inverse condemnation by George G. Jamieson, et al., and Niles Sand and Gravel, et al., against Alameda County Water District. The District also claims damages against these claimants for alleged wastage of water.

The Issue of Inverse Condemnation

Jamieson and Niles are owners of sand and gravel quarrying operations on land, in the city of Fremont, situated above the Niles Cone ground water basin. The District was formed in 1914 for the principal purpose of securing and maintaining the water supply available through the medium of the water basin for the benefit of all of the surface owners above this natural geological feature.

Since 1969 these quarrying operations have been impeded by the presence of water in the quarry pit caused by the general rise of the water level in the water basin as the result of the District's program to introduce additional water into the ground to offset overdraught of prior years.

There is no dispute that this activity on the part of the District is for a beneficial public purpose.

To offset this intrusion of water into the quarry pits, these claimants had pumped water from them and this water was discharged in such a way as to

permit it to run off into San Francisco Bay in substantial quantities, to the general detriment of the water basin and the restorative program of the District.

This Court, after a lengthy hearing and the submission of exhaustive briefs, issued its order enjoining these quarry operators from pumping or discharging water from the pits without the written consent of the District, or further order of this Court.

The testimony adduced at the hearing traced the geological history of the Niles Cone ground water basin, the effect of the domestic, commercial and agricultural uses of water which the advent of increased population had had on the state of nature, and the efforts of the District over the years to replace the overdraught on the original natural water supply. Because of the proximity of this area to San Francisco Bay, the danger of salt water intrusion is ever present.

None of these geological or ecological features is in dispute, however.

The sole question for determination at this stage of the proceedings involves the issue of property rights of the quarry operators. This, in turn, involves the determination of the applicable water level in the water basin. Stated most simply: Whether the District is liable to the quarry operators for damage to their properties caused by the rising water level in the basin depends upon the ground level to which the District can raise the water pursuant to its acknowledged public servitude.

Testimony adduced by the District, and not refuted, establishes the water level in the basin in a "state of nature" at a level of more than 20 feet above sea level.

The operators assert that the "state of nature" level is no longer relevant "due to long-term change of conditions relied upon by the community."

This "change of conditions" was, of course, the overdraft by the increased population. By the mid 1930's the water level of the basin had dropped to 20 feet, or more, below sea level.

Subject quarry operators commenced their activities about 1951. As the result of the lower water level, they were able to conduct dry excavations of sand and gravel to a depth far below that which would have been possible in a state of nature. The operators rely on the contention that the District had "abandoned" the "state of nature" level and should now compensate the operators for any water rising above another and lower level. The question is: What level?

The average prevailing between 1915 and 1970 is advanced by the operators as a proper level upon which to stake their property claim. The average wet season, by this computation is stated to be 8 feet below sea level and the dry season to be 24 feet below sea level. Thus, they state that if the District wishes to maintain the water table at +20′ in both wet and dry seasons it "must 'acquire' (i.e. pay for) 28′ of the operators' property for wet season use and 44′ for dry season use."

The flaw in this reasoning is that there is no evidence that the District has ever "abandoned" or "di-

verted" from the "state of nature" level. There are no such circumstances shown here as were involved in Natural Soda Products Co. vs. City of Los Angeles, 23 Cal.2d 193, where a deliberate change was made in a stream bed flow.

There is no evidence here other than a continuing program to augment and replenish the water supply in the basin by the District in the face of an ever increasing demand for water by the people in the area. There is also no evidence that the operators ever were furnished any information or advice by the District which would have misled them in any way.

The evidence of annual highs and lows of the water table (Defendants' Exhibit A) in the basin, from 1950 to 1970, shows a range of high level from +4′ in 1952 to —41′ in 1961. Likewise, it shows a range of low level from —3′ to —67′. There is no pattern from which an intent on the part of the District to fix a particular different level from the so-called "state of nature" level can be ascertained.

This Court is mindful of the constitutional and statutory provisions safeguarding the right to compensation on the part of a property owner whose property is taken or damaged by a public entity. The discussion of the issues in this memorandum has been limited solely to the search for a "property" right invaded by the District. If such a right could be determined, this Court is of the opinion that the quarry operators would be entitled to recover for any damages sustained. Neither the police power nor the fact that California needs water would justify damage to

a property right by the District without compensation to the owner in the circumstances found here.

But the operators have failed to establish the existence of a basic property right. By the nature of the problem, the "property" line must be found at some point under the surface of the earth, which surface is 60 feet above sea level.

It is, of course, apparent that there has been no interference with the operators' right to remove gravel and sand except the presence of the District's water. Their right to go to "perdition" on their property is otherwise not involved. The testimony was that they always expected to find water at some level.

Extrapolating a statistical average is a dubious method of establishing a property boundary, even one at a subterranean level on a vertical plane.

The only testimony of substance in this case relating to this dominant issue is the "state of nature" water level of 20 feet (plus). This is the sub-surface point at which water would be found, absent an overdraft of the natural ground waters. This, the Court accepts and will base its opinion accordingly.

The Issue of Damages for Diversion of Water by the Operators

Beginning in 1968, pumping and discharging of water from the gravel pits was engaged in by both operators. Through January, 1971, this had amounted to the following:

1.	Jamieson	2.5 billion gallons discharged of which 1.5 billion is claimed to have been wasted (4600 A.F.)
2.	Niles	5 billion gallons discharged of which 2.7 billion is claimed to have been wasted (7700 A.F.)

It would appear that the District is entitled to have the matter of damages on these two matters determined in subsequent proceedings.

DECISION

The following is the decision of the Court:

1. The causes of action of George G. Jamieson, et al., and Niles Sand and Gravel Co., Inc., et al., against Alameda County Water District, a public corporation for inverse condemnation are to be dismissed on the ground that neither party has established the existence of a property interest affected by any of the activities of the District about which complaint has been made. This dismissal is to be without prejudice to the assertion of claims by defendants and cross-complainants in the event that the ground water elevation in their operating pits ex-

ceeds, in the future, an elevation of 20 feet above sea level by reason of the replenishment activities of the District.

2. Further trial, by jury unless waived, is ordered for the determination of damages sustained by the District and caused by the pumping and discharging of water from the operating pits by defendants.

3. Counsel for Plaintiff Alameda County Water District will prepare the necessary papers for the entry of judgment in the actions for inverse condemnation. The matter is continued to November 15, 1971, at 1:30 p.m. for their submission. (Counsel need not appear in person)

Dated: October 15, 1971.

Lyle E. Cook,
Judge of the Superior Court

AUG 29
MICHAEL RODAK, JR.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-61

NILES SAND & GRAVEL CO., INC., and
INLAND AGGREGATES COMPANY,
Petitioners,

VS.

ALAMEDA COUNTY WATER DISTRICT,
Respondent.

REPLY TO PETITION FOR A WRIT OF CERTIORARI to the Court of Appeal of the State of California in and for the First Appellate District

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The opinion of the Honorable Court of Appeal of the State of California, First Appellate District, correctly and sufficiently states the rules of law applicable to the facts presented in this underground water rights case, and said decision is fully in accordance with state and federal constitutional provisions.

The petition for writ of certiorari should be denied.

Dated, August 23, 1974.

Respectfully submitted,
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A PROFESSIONAL CORPORATION,
By JOHN D. ROGERS,
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